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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re GILBERTO A., a Person Coming  
Under the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

GILBERTO A.,

Defendant and Appellant.

G056319

(Super. Ct. No. 18DL0529)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Douglas Hatchimonji, Judge. Affirmed as modified and remanded with directions.

Cindy Brines, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Daniel Rogers and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

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## INTRODUCTION

A conviction for robbery requires evidence “showing that the defendant conceived the intent to steal either before or during the commission of the act of force against the victim,” and if that intent “““arose only after the use of force against the victim, the taking will at most constitute a theft.””” (*People v. Jackson* (2016) 1 Cal.5th 269, 343.) In this case, Gilberto A. pushed and threatened a liquor store owner after he learned the store did not carry a particular type of dice he wanted. After the liquor store owner told him to leave and called the police, Gilberto walked out of the store, but before doing so, took a pack of cigarettes, telling the owner, “I’m taking the cigarettes.”

The juvenile court found Gilberto committed second degree robbery. Insufficient evidence, however, showed Gilberto had conceived the intent to steal either before or during the commission of his acts of force against the liquor store owner. Both the Attorney General and Gilberto, in their respective appellate briefs, agree that if insufficient evidence supports the finding Gilberto committed robbery, this court is authorized under Penal Code sections 1181, subdivision 6 and 1260 to modify the juvenile court’s order to show Gilberto committed the lesser included offense of petty theft as that lesser offense was supported by substantial evidence. We therefore exercise our statutory authority under sections 1181, subdivision 6 and 1260 to so modify the juvenile court’s order to reflect that Gilberto committed a single count of petty theft, and remand with directions to the juvenile court to issue a new disposition order.

## SUMMARY OF TRIAL TESTIMONY

During the late evening of March 23, 2018, Mark Najem was working at the liquor store he owned in Huntington Beach when then-17-year-old Gilberto walked into the store and toward the cardboard display containing dice. Gilberto appeared agitated and was carrying a skateboard. Najem recognized Gilberto because Gilberto had come to the store six or seven weeks earlier to buy dice. On that prior occasion, Gilberto

appeared similarly agitated and acted disrespectfully toward Najem; Najem sold Gilberto dice for \$1 and felt happy and relieved when Gilberto left the store.

This time, Gilberto did not find the type of dice he wanted. He told Najem he was looking for a special kind of dice that were very white and bright. Najem told Gilberto, “I don’t have that” type; he only had dice that appeared “kind of old.” Gilberto became angry and threw the cardboard display from the counter to the floor. Najem told him to stop, reiterated he did not have the dice Gilberto was looking for, and asked him to leave the store.

Gilberto started cussing and pushed Najem on the chest with one hand, causing Najem to back up. Najem felt upset and scared and feared that Gilberto was advancing toward his cash register and planned to rob him. Gilberto came behind the counter and pushed Najem a second time and threatened Najem by telling him, “I’ll beat you.”

After the second push, Najem reached for the phone under the counter and told Gilberto to leave. Gilberto asked Najem if he was calling the police and Najem said he was and that Gilberto had better leave; Najem began to dial. Najem told the police dispatcher, “There’s a guy here and he’s threatening me, and he’s behind the counter, and I want him to leave.” Gilberto picked up a pack of cigarettes<sup>1</sup> behind the counter, told Najem, “I’m taking the cigarettes,” turned his back on Najem, told Najem to “call the police,” and walked out of the store. Najem followed Gilberto out of the store while he continued to talk to the police dispatcher to provide information about Gilberto’s appearance and the direction in which he was heading.

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<sup>1</sup> The retail price of the cigarettes was \$5.99 plus tax.

## PROCEDURAL HISTORY

A juvenile delinquency petition, filed in the Orange County Juvenile Court, alleged that in March 2018, Gilberto committed second degree robbery in violation of Penal Code sections 211 and 212.5, subdivision (c). Following trial, the juvenile court found the allegations of the petition true beyond a reasonable doubt and declared Gilberto a ward of the court under Welfare and Institutions Code section 602.

The juvenile court deemed the robbery offense to be a felony for which Gilberto faced a “maximum term of confinement” of five years. The court ordered Gilberto committed to the care, custody, and control of the Orange County probation department for a commitment of 170 days in juvenile hall or an appropriate facility, with 50 days’ credit for time served. Gilberto appealed.

## DISCUSSION

### I.

#### *Standard of Review*

The same substantial evidence standard of review in adult criminal cases is applicable in juvenile delinquency proceedings. (*In re Roderick P.* (1972) 7 Cal.3d 801, 809.) “In considering the sufficiency of the evidence in a juvenile proceeding, the appellate court ‘must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. We must presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence [citation] and we must make all reasonable inferences that support the finding of the juvenile court.’” (*In re Babak S.* (1993) 18 Cal.App.4th 1077, 1088-1089; accord, *People v. Thomas* (1992) 2 Cal.4th 489, 514, *People v. Barnes* (1986) 42 Cal.3d 284, 303.)

II.  
*Insufficient Evidence Supported the Juvenile Court's Finding Gilberto  
Committed Robbery.*

Gilberto argues the finding he committed second degree robbery is not supported by substantial evidence because insufficient evidence showed (1) force or fear was used in the taking of the cigarettes, and (2) he formed the required intent to steal before or during the use of force. We do not need to address whether sufficient evidence showed the taking of the cigarettes was accomplished by means of force or fear because insufficient evidence showed Gilberto formed the required intent to steal before or during the time he used force.

Penal Code section 211 provides: "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." The Supreme Court has held: "A conviction of robbery requires evidence showing that the defendant conceived the intent to steal either before or during the commission of the act of force against the victim. [Citation.] "[I]f the intent arose only after the use of force against the victim, the taking will at most constitute a theft." (*People v. Jackson, supra*, 1 Cal.5th at p. 343.) "The wrongful intent and the act of force or fear 'must concur in the sense that the act must be motivated by the intent.'" (*People v. Marshall* (1997) 15 Cal.4th 1, 34.)

In *People v. Marshall, supra*, 15 Cal.4th at page 34, the California Supreme Court concluded that while the evidence was sufficient to support the defendant's convictions for attempted rape and first degree murder, it was insufficient to support the defendant's robbery conviction as to one of the victims. The court explained: "The evidence here is not sufficient to establish the necessary concurrence of intent to steal and the act of force. The only property that defendant took from [the victim] was a letter to her from a grocery responding to her request for a check-cashing card. (The letter was in defendant's possession when the police detained him.) There is no evidence that

defendant killed [the victim] for the purpose of obtaining this letter from her. Although the condition of [the victim]’s body and the cause of death establish use of force against [the victim], they do not suggest or give rise to an inference that the force was exerted to obtain the letter.” (*Ibid.*)

The court in *People v. Marshall, supra*, 15 Cal.4th at page 35 rejected the prosecution’s argument that when the defendant killed the victim, he intended to collect a token or souvenir from her and thus, according to the prosecutor’s theory, the defendant had the requisite intent to steal at the time of the act of force against the victim, even if the force was directed towards the criminal objective of rape rather than the taking of property. The court explained: “Defendant’s possession of the letter written to [the victim] by the grocery market supports an inference that he took the letter from [the victim] or her immediate presence, but is not evidence that ‘reasonably inspires confidence’ [citation] that defendant killed [the victim] for the *purpose* of obtaining the letter. If a person commits a murder, and after doing so takes the victim’s wallet, the jury may reasonably infer that the murder was committed for the purpose of obtaining the wallet, because murders are commonly committed to obtain money. In this case, however, the letter taken by defendant was, in the prosecutor’s words, an ‘insignificant piece of paper.’ The prosecution offered no evidence tending to show that the grocery’s letter responding to [the victim]’s request for a check-cashing card was so valuable to defendant that he would be willing to commit murder to obtain it. Accordingly, defendant’s possession of the letter does not constitute evidence of sufficient ‘solid value’ [citation] to support the conclusion that defendant killed [the victim] so that he could obtain possession of the letter. The prosecution’s argument to the contrary is based purely on speculation. As we have said before, mere speculation cannot support a conviction. [Citations.] To be legally sufficient, evidence must be reasonable, credible, and of solid value.” (*Ibid.*)

Here, the evidence showed Gilberto pushed and threatened Najem because he was upset the liquor store did not have a particular type of dice in stock. No evidence suggested Gilberto formed an intent to steal until after his acts of force against Najem had concluded, and Najem called the police and told Gilberto he had better leave the store. The evidence showed it was not until that point that Gilberto first formed an intent to steal; he picked up a pack of cigarettes, told Najem he was taking the cigarettes, and left the store. The implied finding he formed an intent to steal the cigarettes before or during his verbal and physical assault of Najem is speculative.

### III.

#### *We Modify the Disposition Order to Show Gilberto Committed a Single Count of Petty Theft.*

In the appellate respondent's brief, the Attorney General argues: "If this Court concludes that the evidence failed to establish the robbery, then it should follow appellant's invitation in the juvenile court and modify the disposition to reflect a finding on theft. This court is authorized to make such a modification under Penal Code section 1181, subdivision 6 and section 1260. . . . [¶] Here, there is no question that appellant committed petty theft when he stole the pack of cigarettes. There is no question that he harbored the intent to steal at some point. The only question in this appeal is whether he harbored that intent before or during the application of force or fear. If this court concludes the evidence is insufficient to support the robbery, it should modify the disposition to reflect a petty theft finding."

In his reply brief, Gilberto states he "agrees with respondent that if the evidence failed to establish robbery, this Court is authorized to modify the disposition to reflect a finding that appellant committed the lesser-included offense of theft under Penal Code section 1181, subdivision 6 and section 1260." Gilberto notes, however, this court is not required to so modify the disposition to reflect a finding that the lesser included offense had been committed.

Here, in finding Gilberto committed second degree robbery, the juvenile court necessarily had to find true all the elements of the offense of petty theft. (See Pen. Code, § 484.) We find substantial evidence supported the finding Gilberto committed petty theft in taking the store's cigarettes away with him when he left the store, without paying for them or obtaining Najem's consent; Gilberto has not asserted on appeal a lack of sufficient evidence to support such a finding. We therefore modify the finding Gilberto committed second degree robbery to reflect the commission of a single count of petty theft. (See Pen. Code, §§ 1181, subd. 6, 1260; *People v. Navarro* (2007) 40 Cal.4th 668, 671.)

#### DISPOSITION

We modify the order sustaining the petition to reflect that Gilberto committed a single count of petty theft and, as so modified, that order is affirmed. We remand with directions that the juvenile court issue a new disposition order.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.